IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

v.

JOHN DANIEL, *Respondent.*

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, *Petitioners,*

v.

JOHN DANIEL, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

and

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

[Counsel Listed Inside Cover]

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America [hereinafter the Chamber], pursuant to Supreme Court Rule 42, hereby moves for leave to file a brief as *amicus curiae* in support of the petition to reverse the decision of the United States Court of Appeals for the Seventh Circuit. The motion is necessitated by respondent's refusal to consent to the filing of the appended brief.[1]

The Chamber is the major national federation of business and professional organizations, both large and small, with a total membership in excess of 73,000 enterprises and organizations, including chambers of commerce and trade associations, representing businessmen and businesswomen throughout the United States. Over 69,000 corporations, partnerships, proprietorships and professional people are members of the Chamber; 83 percent of the members are small businesses with 100 or fewer employees. Many of the Chamber's members sponsor or participate in mandatory, non-contributory pension plans—the type of plan directly affected by the decision of the courts below.

In addition, the Chamber itself, for its employees, sponsors a mandatory, non-contributory pension plan qualified pursuant to 26 U.S.C. § 401 (1967) and subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* (1975).

The Chamber regularly represents its members' interests in matters before the courts, the United States Congress, the Executive Branch and Federal regulatory agencies. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as *amicus curiae* in numerous cases before this Court.[2]

[1] Petitioners have consented pursuant to Supreme Court Rule 42.

The issue presented in this case is the applicability of the anti-fraud provisions of the Federal securities laws[3] to employee interests in mandatory, non-contributory pension plans. It has a direct and immediate impact upon the Chamber and its members. The decision below that such an interest is a "security" which is "sold" each and every work day to millions of employees, and thus subject to the Federal securities law, imposes substantial additional compliance obligations upon employers, plan administrators, trustees, and other fiduciaries who are already burdened by the comprehensive requirements of ERISA.

Furthermore, affirmance of the decision of the court below would invite state authorities to re-evaluate the status of pension plans under local securities laws and would likely result in significant additional burdens to many employers.

[2] *E.g., United States* v. *United States Gypsum Co.*, No. 76-1560; *Malone* v. *White Motor Corp.*, 46 U.S.L.W. 4295 (1978); *New York Telephone Co.* v. *New York*, No. 77-961; *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 268 (1974); *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. 132 (1975).

In the area of securities law, the Chamber has participated in *Natural Resources Defense Council, Inc.* v. *Securities and Exchange Commission, appeal docketed*, No. 77-1761 (D.C. Cir. Aug. 22, 1977).

[3] Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1971); SEC Rule 10b-5, 17 C.F.R. 240.10b-5 (1977); Securities Act of 1933, § 17(a), 15 U.S.C. § 77(g) (1971).

It is the position of the Chamber that these burdens, devoid of any meaningful corresponding benefits to employees, would weigh especially heavily upon small businesses which would have to incur the additional costs which securities law compliance imposes. Neither the petitioners nor the other *amici curiae* can bring to this Court the unique perspective of small employers who sponsor mandatory, non-contributory pension plans.

For these reasons, it is respectfully requested that the motion of the Chamber for leave to file this brief as *amicus curiae* in support of petitioners be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The Chamber respectfully refers to its Motion for Leave to File Brief as Amicus Curiae in Support of Petitioners, to which this Brief is appended, as a statement of its interest in the above-captioned matter.

ARGUMENT

Undergirding the decisions of the courts below that a mandatory, non-contributory pension plan is a "security" or "investment contract" subject to the anti-fraud provisions, but not the registration and reporting provisions, of the Federal securities laws is the belief articulated by the Court of Appeals that "[t]he type of fraud allegedly perpetrated . . . is among those the securities laws were passed to prevent and remedy." 561 F.2d at 1242.

In order to reach this conclusion, respondent and the lower courts here, of necessity, engaged in a laboriously tortured reading of the purpose and scope of the securities laws, contradicting the views of sister courts which have addressed this same issue. *Hurn* v. *Retirement Fund Trust of Plumbing, Heating and Piping Industry,* 424 F. Supp. 80 (D.C. Cal. 1976); *Wiens* v. *Int'l Brotherhood of Teamsters,* Fed. Sec. L. Rep. (CCH) ¶96,005 (C.D. Cal. March 28, 1977); *see also, Robinson* v. *UMW Health & Retirement Funds,* 435 F. Supp. 245 (D.D.C. 1977); *but see, Schlansky* v. *United Merchants & Manufacturers, Inc.,* 443 F. Supp. 1054 (S.D.N.Y. 1977). Judge Tone, in his concurring opinion, deftly understated the degree to which the opinions below tax the whole area of pension plan administration when he stated that, "[t]he series of transactions by which Daniel acquired his interest or expectancy, such as it was, *do not fit neatly* into the traditional concept of a sale of a security." 561 F.2d at 1251. [Emphasis added.]

Furthermore, in reaching their conclusion, the courts below essentially ignored the onerous implications of their decisions by stating, again in the words of the Court of Appeals, that "[t]here should be no undue burden caused by . . . the anti-fraud provisions . . . because all the material information will be readily available to the plan trustees since their actuaries needed all of the information to set up the plan in the first place." 561 F.2d at 1250.

The Chamber, as *amicus curiae,* respectfully suggests that the decisions of the courts below are fundamentally in error. First the pragmatic "economic reality" test enunciated in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 852 (1975), compels a finding that a mandatory, non-contributory pension plan is neither a "security" nor an "investment contract," nor does a "sale" take place each time a plan participant either takes a job in the first instance or decides each day thereafter to go to work.[4]

Second, the introduction of securities laws concepts to a foreign environment, namely, the relationship between and among (1) mandatory, non-contributory pension plans, (2) plan sponsors, administrators, trustees and other fiduciaries, and (3) plan participants and beneficiaries does not, as a matter of policy, yield sufficient benefit to employees to warrant the substantial cost to employers and plan administrators.

The first issue—that an interest in a pension plan is not a "security"—is being fully argued by the parties to this litigation. As a result, the Chamber will

[4] That a mandatory, non-contributory pension plan does not "fit neatly" into the conceptual framework of the "sale" of a "security" is further demonstrated by this Court's discussion in *Alabama Power Co.* v. *Davis,* 431 U.S. 581 (1977):

> It is difficult to maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment. 431 U.S. at 593.

concentrate upon the ramifications of the opinions below in the context of a cost-benefit analysis. This analysis leads the Chamber to conclude that the importation of the securities laws into an alien environment, already dominated by ERISA, is unsound and unnecessary.

I. EXPANSION OF THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS TO THE PENSION PLAN AREA IS UNWARRANTED FROM ANY COST-BENEFIT ANALYSIS.

From a policy perspective, the Chamber considers it necessary to inquire whether novel and clearly strained interpretations of the securities laws below afford potential plaintiffs benefits which warrant the substantial costs of such interpretations. It is the judgment of the Chamber that they do not. Accordingly, the practical effect of the decision below could well be that a further deterrent to the creation or continuation of pension plans has been established without any compensating enlargement of employees' rights.[5]

A. Other Remedies Ave Available to Respondent and Other Plan Participants.

The Chamber does not understand that Daniel's remedy for any alleged wrong depends exclusively upon the outcome of this appeal. Breaches of fiduciary

[5] The administrative burdens imposed by ERISA have already contributed in substantial measure to terminations of pension plans, especially plans established by small businesses. A recent Congressional survey of selected businesses which reported termination of pension plans during the period from June 1976 through April 1977 found that ERISA had a "substantial" effect on the decisions to terminate in more than 66 percent of the cases. Over 90 percent of those surveyed had 50 or fewer employees. Staff of the House Comm. on Small Business, 95th Cong., 1st Sess., ERISA Questionnaire Results (Comm. Print 1977).

duty are actionable, as well as is common law fraud. Daniel himself recognized this in the pendent claims included in his complaint. *See* 410 F. Supp. at 543.

In addition, ERISA established a comprehensive program for the regulation of pension programs. So pervasive is that program that it is doubtful that Congress contemplated that the affirmative obligations of the anti-fraud provisions of Section 10b and Rule 10b-5 were to be added to it.[6] Indeed, ERISA mandates substantial disclosure of the provisions of pension plans to participants and beneficiaries. These disclosure requirements may not be co-extensive with, but approach anti-fraud disclosure requirements,[7] as the Securities

[6] Indicative of this judgment is legislation recently introduced which would have the effect of "overruling . . . the Daniel decision." 124 Cong. Rec. S.6585 (daily ed. May 1, 1978) (remarks of Sen. Javits).

As described in the section-by-section analysis accompanying the legislative text, section 274 of S. 3017, the "ERISA Improvements Act of 1978", provides:

> . . . that ERISA supercedes Federal and State securities laws to the extent that such laws might be applied to the interest of an employee in an employee benefit plan. This change makes it clear that the interest of an employee in an employee benefit plan described in section 4(a) and not exempt under section 4(b) of ERISA is not a security within the meaning of Federal or State securities laws unless such plan is an eligible individual account plan in which participation is voluntary.
> *Id.* at S.6600.

[7] ERISA § 104(b)(1), 29 U.S.C. 1024(b)(1) (1975), for example, requires that a copy of the pension plan and a summary plan description be distributed to each participant and beneficiary within 90 days after the individual becomes a participant or beneficiary. ERISA § 102(a)(1), 29 U.S.C. 1022(a)(1) (1975), requires that the summary "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." Similarly, § 104(b)(2), 29 U.S.C. 1024(b)(2) (1975),

and Exchange Commission (SEC) itself has conceded. Oversight of ERISA, 1977: Hearings before the Subcommittee on Labor of the Committee on Human Resources, U.S. Senate, 95th Cong., 1st Sess. (1977) 115 (testimony of Harold M. Williams, Chairman, SEC) (hereinafter cited as Senate Oversight Hearings.)

In view of the pervasiveness of the ERISA scheme and of recent interpretations limiting the scope of Section 10b in the securities area,[8] there seems to be

requires that "copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments" be made available for examination upon request by any participant or beneficiary. In addition, ERISA § 105(a), 29 U.S.C. 1025(a) (1975), requires that participants and beneficiaries who so request be provided an accounting of:

> "(1) the benefits accrued, and
> (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

[8] For interpretations of the requirement of scienter see *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977). For discussions of the requirement that the act or omission complained of be material see *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). For limitations on the class of plaintiff who can resort to Section 10b, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

It seems clear that these requirements would have to be met in a pension plan context. The following is a colloquy between Senator Harrison Williams, Chairman of the Committee on Human Resources, and SEC Chairman Williams:

> *Senator Williams.* If at the time of employment there was a full description of the plan in the mind of the individual describing the plan, and a detail were unintentionally left out, I would imagine then that later on if an action were brought claiming fraud, the burden of proof would be on the individual to prove that it was intentionally left out of the description.

little public policy support for the extension of the anti-fraud provisions sought here by respondent.[9]

B. The Affirmative Obligations of the Anti-Fraud Provisions Which Would Be Imposed Upon Plan Sponsors, Administrators, Trustees and Fiduciaries Are Substantial.

Under the decisions below, an entire body of law, intended to function in the world of issuers, underwriters and investors, would be moved into the field of pension plan administration, already regulated by ERISA. The move is full of peril for even the most cautious plan sponsors, trustees, administrators and fiduciaries. It has been reported that one study, prepared for the Department of Labor, has assessed that potential liability to be in a range between $3.5 billion and $49.6 billion. BNA, Washington Financial Reports, p. A-19 (May 1, 1978).

The implications of such a move cannot be described with precision. What follows, therefore, can at best be

> *Mr. Williams.* If I can take you literally that there was a detail omitted, I question whether the omission would be substantive enough to be a pivotal item. Apart from that, it would be a matter of whether the omission was substantive, whether there was scienter, whether the omission was either deliberate or grossly negligent, and whether, in fact, it was the type of information—or lack of information—that the employee can show he relied on. (Senate Oversight Hearings at 115.)

[9] Since the Summary Plan Description must contain a statement of the applicable break-in-service rules, 29 C.F.R. § 2520.102-3(n) (1977), it would be unlikely that the instant case could arise post-ERISA. As the Court of Appeals below itself noted with respect to causation:

> . . . if the plan documents sent to a plan beneficiary understandably disclose [the break-in-service rules], a retiree who does not meet the vesting requirements will have no remedy under the securities acts, *even if he subjectively did not comprehend the disclosed information.* 561 F.2d 1251. [Emphasis added.]

a partial assessment of the difficulties which can be anticipated.

1. The lack of precise guidelines.

A major problem is that even in the environment of securities regulation, the exact requirements of Section 10b and Rule 10b-5 are unclear.[10] There is already the suggestion that even less precision can be expected by their application to a new area. For example, the SEC itself has taken the position, with respect to the application of the anti-fraud provisions to pension plans, that "[t]here is, and can be, no definite list of items which must be disclosed under the antifraud provisions." Memorandum of SEC General Counsel's Office, Senate Oversight Hearings at 124. This same memorandum concludes that, "the efficacy of the antifraud provisions would be sacrificed if hard and fast rules were laid down as to what those provisions required." *Id.* at 125.

Clearly, something beyond ERISA-type disclosures seems to be contemplated. While emphasizing the value of ERISA disclosures in the context of anti-fraud compliance, Chairman Williams of the SEC has stated that ERISA disclosure is not identical to SEC disclosures applicable to pension plans:

> It [compliance with the anti-fraud provisions] is not merely disclosure. What it says is that those responsible for pension funds—not merely administrators, but employers as well—will not make representations or it will not engage in failure to make misrepresentations, where the effect is to defraud the plan participant.
>
> Senate Oversight Hearings at 114.

[10] See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 1180 (1963).

Chairman Williams then concluded with respect to the guidelines for plan sponsors and administrators:

> I think they are very simple. Do not intentionally mislead your employees in a way that would serve *as any inducement* relative to a pension plan or retirement plan.
>
> *Id.* at 115 [Emphasis added.].

Far from being guidelines, these meaningless nostrums only enhance the prospect of litigation. The following discussion attempts to give some idea of the dimensions of future problems.

The court below would require that the actuarial probability that a plan participant will become a plan beneficiary be stated in a "manner comprehensible to the average worker." 561 F. 2d at 1251. To do so would also require that the assumptions upon which the actuarial probability is based be provided, since, otherwise, the plan participant could complain that a proper assessment of the actuarial report is not possible. The translation of such highly technical data into what, by judicial hindsight, is "comprehensible to the average worker" is difficult enough in the absence of guidelines; it is unknown whether compliance is possible at all since the information may not be available.[11] It seems

[11] With respect to the availability of such actuarial information, one study, prepared for the Dept. of Labor, has recently been reported to have reached the following conclusions:

> Disagreeing with the statement in the opinion of the seventh circuit appeals court that the type of disclosure contemplated by the antifraud provisions, including the actuarial probability that an employee would actually receive benefits, would not be unduly burdensome, the study says that in fact the information necessary to make such calculations is available for only a "handful of plans" and could not be developed in a statistically valid manner, even if cost was not a factor. Statements

anomalous that this requirement of furnishing an actuarial probability is brought in via an application of the securities laws when it was excluded by Congress from ERISA's comprehensive reporting requirements.

The illustration demonstrates that the courts below missed the fundamental point underlying the argument of the burdens imposed by its decision when the Court of Appeals concluded that, "the anti-fraud provisions do not establish an affirmative disclosure system requiring the filing of documents." 561 F. 2d at 1247. To be sure, the anti-fraud provisions are "a generally self-executing prohibition against fraudulent activity." *Ibid.* But this does not mean that the anti-fraud provisions impose no affirmative obligations upon those who administer the plan. Indeed, the anti-fraud provisions raise two substantial practical questions: First, what constitutes a material fact? Second, what safeguards must be undertaken to ensure against omissions or misrepresentations that might later be asserted as fraudulent?

In the context of pension plan administration, the issue of materiality will certainly be different than that which has been applied in securities cases. To guard against omission of a "material" fact, pension plan sponsors, administrators, trustees and fiduciaries would have to consider factors which workers would

to employees about their individual probabilities of receiving benefits would probably be misleading because of the virtual impossibility of providing accurate information and there is doubt that any disclosure in addition to that required by ERISA would provide assistance to employees, the study says.

BNA, Washington, Financial Reports, p. A-10 (May 1, 1978).

themselves take into account in deciding whether to seek alternative employment.[12]

Using the criterion that decisions to seek alternative employment are investment decisions, the very health of the business enterprise itself *may* be deemed material to that decision by some future court, since all contributions to the plan are made by the employer. Surely, if an individual were aware that the industry or business were declining, this might influence his decision to seek or retain employment.[13] Consequently, *amicus* respectfully suggests that, for the small and medium-sized employer whose stock is exempt from registration under one or more of the provisions of the securities laws, compliance with the anti-fraud requirements in the context of pension plan administration may impose substantial obligations to which such employers are totally unaccustomed and—by statute and rule—which they are not otherwise required to bear. Similarly, non-stock enterprises would be required to familiarize themselves with a totally new area of regulation.

[12] It is clear from the affidavit submitted by respondent to the District Court that he is well aware of the applicable definition of materiality. The Court of Appeals below recounted that, according to the affidavit, the Local 705 pension plan was a "material factor in his [Daniel's] continuing employment with Local 705 covered employees," and, had Daniel known of the break-in-service rule, "he would have sought employment elsewhere." 561 F.2d at 1227.

[13] As the Second Circuit has noted: "[M]aterial facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the *probable future* of the company and those which affect the *desire of investors to buy, sell, or hold the company's securities.*" *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 849 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). [Emphasis added.]

An example of the difficulty of the "materiality" test when applied outside of the securities area is afforded when a company is entertaining the thought of re-locating a plant site. The exploration of such a move normally would not be relevant in a securities context. However, it might be material to a worker who is, in the opinion of the court below, making a daily investment decision whether to accept alternative employment opportunities.

A second issue is that of the safeguards which potential defendants would have to adopt. Several courses might have to be followed that would result in detriment to sound employer-employee relations. This Court has evidenced its disinclination to throw open to the trier of fact many hazy issues of historical fact the proof of which depended almost entirely upon oral testimony. *Blue Chip Stamps, supra,* at 743. In the context of this case, if Section 10b liability were possible, then each and every time a plan sponsor, administrator, trustee or fiduciary, or their agents, discussed the terms and conditions of a mandatory, non-contributory plan, each such discussion would be subject to misunderstanding and provide a possible basis for litigation. Unlike the traditional securities market, where communications are habitually memorialized, except for those documents which ERISA mandates be provided plan participants and beneficiaries, most communications concerning plan terms and particularly plan benefits are oral. As a result, litigation may very often resolve itself into nothing more than "swearing contests" which demonstrate the inherent untrustworthiness of oral communications.

Alternatively and in order to avoid litigation, communications to employees may become restricted to formal writings, adopted from models used in submissions to sophisticated investors. This very likely course is antithetical to sound concepts of employee relations.

2. Possible liability under state law.

If an interest in a mandatory, non-contributory plan is an "investment contract" for Federal securities law purposes, it probably will be deemed to be an "investment contract" for state law purposes, and thus a security under the blue sky laws of most states.[14]

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[14] The following states define security to include an "investment contract:" Alabama, *Ala. Code* tit. 53 § 36(j) (Interim Supp. 1975); Alaska, *Alaska Stat.* § 45.55.130(12) (1962); Arizona, *Ariz. Rev. Stat.* § 44-1801(13) (1967); Arkansas, *Ark. Stat. Ann.* § 67-1247 (1) (1966); Colorado, *Colo. Rev. Stat.* § 125-1-12(13) (1964); Connecticut, *Conn. Gen. Stat.* § 36-321(b) (1969); Florida, *Fla. Stat.* § 517.02(1) (1972); Georgia, *Ga. Code Ann.* § 97-102 (1976); Hawaii, *Haw. Rev. Stat.* tit. 26 § 485-1(12) (1976); Idaho, *Idaho Code* § 30-1402(12) (1967); Illinois, *Ill. Rev. Stat.* ch. 121½ § 137.2-1 (Cum. Supp. 1978); Indiana, *Ind. Code* § 23-2-1-1(k) (1972); Iowa, *Iowa Code* § 502.102,12 (Cum. Supp. 1977-78); Kansas, *Kans. Stat.* § 17-1252(j) (1974); Kentucky, *Ky. Rev. Stat.* § 292.310(11) (1971); Louisiana, *La. Rev. Stat. Ann.* § 51:701(1) (West Cum. Supp. 1978); Maryland, *Md. Corp. & Ass'ns Code Ann.* § 11-101(0) (1975); Minnesota, *Minn. Stat.* § 80A.14 (q) (Cum. Supp. 1978); Mississippi, *Miss. Code Ann.* § 75-71-5(c) (1973); Missouri, *Mo. Rev. Stat.* § 409.401(k)(1) (Cum. Supp. 1978); Montana, *Mont. Rev. Codes Ann.* § 15-2004(11) (1967); Nebraska, *Neb. Rev. Stat.* § 8-1101(12) (1974); Nevada, *Nev. Rev. Stat.* § 90.090(1), (2) (1973); New Jersey, *N.J. Rev. Stat.* § 49:3-49(m) (1970); North Carolina, *N.C. Gen. Stat.* § 78-A-2(11) (1975); Oklahoma, *Okla. Stat.* tit. 71 § 2(1) (1965); Oregon, *Or. Rev. Stat.* § 59.015(13) (1971); South Carolina, *S.C. Code* § 35-1-20(12) (1976); South Dakota, *S.D. Compiled Laws Ann.* § 47-31-1(4) (Supp. 1977); Texas, *Tex. Stat. Ann.* tit. 19 § 581-4A (Vernon 1964); Utah, *Utah Code Ann.* § 61-1-13(12) (1953); Washington, *Wash. Rev. Code Ann.* § 21.20.005(12) (Supp. 1976); West Virginia, *W. Va. Code* § 32-4-401(1) (1975); Wisconsin, *Wis. Stat. Ann.* § 551.02(13) (West 1977); Wyoming, *Wyo. Stat.* § 17-117.13(k) (1957).

Some states provide an exemption for securities issued in connection with an employee benefit plan.[15] Even if this exemption is applicable, however, its availability is usually conditioned upon written notice to the appropriate state official a certain number of days before the inception of the plan.[16] Until recently it has

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[15] Alabama, *Ala. Code* tit. 53 § 37(j) (Cum. Supp. 1973); Alaska, *Alaska Stat.* § 45.55.140(a)(5) (1962); Arkansas, *Ark. Stat. Ann.* § 67-1248(a)(10) (1966); Colorado, *Colo. Rev. Stat.* § 125-1-13(k) (1964); Connecticut, *Conn. Gen. Stat.* § 36-322(a)(6)(D) (1969); District of Columbia, *D.C. Code* § 2-2401(e)5 (1973); Florida, *Fla. Stat.* § 517.06(5) (1972); Georgia, *Ga. Code Ann.* § 97-109(i)(2) (1976); Hawaii, *Haw. Rev. Stat.* tit. 26 § 485-4(11) (1976); Illinois, *Ill. Rev. Stat.* ch. 121½ § 137.30(1) (Cum. Supp. 1978); Indiana, *Ind. Code* § 23-2-1-2(a)(8) (1972); Iowa, *Iowa Code* § 502.202, 11 (Cum. Supp. 1977-78); Kansas, *Kans. Stat.* § 17-1261 (j) (1974); Kentucky, *Ky. Rev. Stat.* § 292.400(11) (1971); Louisiana, *La. Rev. Stat. Ann.* § 51:704(12) (West Cum. Supp. 1978); Maryland, *Md. Corp. & Ass'ns Code Ann.* § 11-601(11) (1975); Minnesota, *Minn. Stat.* § 80A.15 (Subd. 1)(h) (Cum. Supp. 1978); Missouri, *Mo. Rev. Stat.* § 409.402(a)(11) (Cum. Supp. 1978); Montana, *Mont. Rev. Codes Ann.* § 15-2013(11) (1967); Nebraska, *Neb. Rev. Stat.* § 8-1110(10) (1974); New Jersey, *N.J. Rev. Stat.* § 49:3-50(a)(11) (1970); New Mexico, *N.M. Stat. Ann.* § 48-18-21(I) (1966); Oklahoma, *Okla. Stat.* tit. 71, § 401(a)(11) (1965); Pennsylvania, *Pa. Stat. Ann.* tit. 70 § 1-202(g) (Purdon Cum. Supp. 1977-78); South Carolina, *S.C. Code* § 35-1-310(10) (1976); South Dakota, *S.D. Compiled Laws Ann.* § 47-31-81 (Supp. 1967); Texas, *Tex. Stat. Ann.* tit. 19 § 581-5H (Vernon 1964); Utah, *Utah Code Ann.* § 61-1-14(1)(j) (1953); Washington, *Wash. Rev. Code Ann.* § 21.20.310(10) (Supp. 1976); West Virginia, *W. Va. Code Ann.* § 32-4-402(a)(11) (Michie 1975); Wisconsin, *Wis. Stat. Ann.* § 551.22(10) (West 1977); Wyoming, *Wyo. Stat.* § 17-117.14(a)(10) (1957). *See also Uniform Securities Act* § 402(a)(11).

[16] *See e.g.*, Alaska, *Alaska Stat.* § 45.55.140(a)(5) (1962); Arkansas, *Ark. Stat. Ann.* § 67-1248(a)(10) (1966); Colorado, *Colo. Rev. Stat.* § 125-1-13(K) (1964); Delaware, *Del. Code Ann.* tit. 6, § 7309(a)(11) (1975); Hawaii, *Haw. Rev. Stat.* tit. 26, § 485-4(11) (1976); Kansas, *Kans. Stat.* § 17-1261(j) (1974); Kentucky, *Ky. Rev. Stat.* § 292.400(11) (1971); Maryland, *Md. Corp. & Ass'ns*

not been seriously contended that interests in mandatory, non-contributory employee benefit plans are securities.[17] Accordingly, it seems highly unlikely that either employers or plan trustees would have provided the required notice.[18] All interests issued without the requisite notice would have been issued in violation of the applicable blue sky laws and consequently the plan trustees could be exposed to substantial liability, over and above the potential liabilities considered by Congress when it enacted ERISA.[19]

Code Ann. § 11-601(11) (1975); Missouri, *Mo. Rev. Stat.* § 409.402 (a)(11) (Cum. Supp. 1978); Utah, *Utah Code Ann.* § 61-1-14(1) (J) (1953); Washington, *Wash. Rev. Code Ann.* § 21.20.310(10) (Supp. 1976); West Virginia, *W.Va. Code Ann.* § 32-4-402(a)(11) (1975); Wisconsin, *Wisc. Stat. Ann.* § 551.22(10) (West 1977); Wyoming, *Wyo. Stat.* § 17-117 14(a)(10) (1957). *See also Uniform Securities Act* § 402(a)(11).

[17] This fact greatly troubled Judge Tone, who, in his concurring opinion below, stated:

> Apparently for the first time ever, [the SEC] now takes the position in its brief before us that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws. The Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position. As late as 1971 in its *Institutional Investor Study* submitted to Congress in connection with the consideration of the ERISA legislation, the Commission's view was that although a non-contributory pension plan might well be an investment contract, the element of sale was lacking. *Before that, not even the existence of a security was acknowledged* .... [Emphasis added].

561 F.2d at 1251 (footnotes omitted).

[18] *See generally*, General Subcommittee on *Daniel, et al.* v. *International Brotherhood of Teamsters*, A Report to the Committee on Federal Regulation of Securities from the Study Group of 1933 Act, 32 *Bus. Law.* 1925, 1927 (1977).

[19] ERISA section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1975), provides, in pertinent part, that "... nothing in this title shall be construed to exempt or relieve any person from any law

Furthermore, several states do not exempt interests in mandatory, non-contributory pension plans from the blue sky law registration requirements.[20] In those states, the employer or plan trustee would be saddled with the burdens of compliance with the state blue sky laws which, in most if not all instances, are not designed to provide protection to employees acquiring interests in such plans.

of any State which regulates . . . securities." Thus, this ambiguous exception from the all-pervasive pre-exemption provision contained in § 514(a) of ERISA, 29 U.S.C. § 1144(a) (1975), if read *in pari materia* with the decisions below, could be construed as support for state regulation of the kind discussed here. ***But cf.***, the discussion of pending bill S. 3017, *supra* at n. 6.

[20] Arizona, Mississippi, Nevada.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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